No. 2381

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a corporation,
Defendant in Error.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

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In this action the evidence shows that the run of the train crew was from Tacoma, Washington, to Portland, Oregon, on passenger train No. 303, and return from Portland to Tacoma on passenger train No. 308.

Train 303 was scheduled to leave Tacoma at 1:40 P. M. and arrive at Portland at 6:45 P. M., This would make the time of the crew on duty 5 hours 35 minutes, including the 30 minutes preparatory time.

Train 308 was scheduled to leave Portland at

7:25 A. M. and arrive in Tacoma at 12:35 P. M., making the time of the crew on duty, including preparatory time 5 hours 40 minutes.

If the trains made their scheduled time, the crew was off duty at Portland 12 hours and at Tacoma 24 hours 35 minutes.

It is shown that between the stations of South Tacoma and Lakeview there is a single track over which was operated the trains of the Northern Pacific, Great Northern and Oregon-Washington Railroad & Navigation Companies, a total of 28 passenger trains daily, beside a large number of freight trains.

On May 12, 1913, train No. 303 left Tacoma at 1:40 P. M. (on schedule time) and was due to meet passenger train No. 362 of the Oregon-Washington Railroad & Navigation Company at the station of South Tacoma at 1:56 P. M. Train No. 362 was derailed between Lakeview and South Tacoma at about 1:50 P. M. (Record p. 22). This derailmen tore up the track, over-turned the engine and coaches of 362, and prevented train 303 from proceeding on to Portland until about 6 o'clock P. M., when the crew and passengers of train 303 were transferred to passenger train 314, which had come up from Portland. Passenger train 314, with the crew and passengers of 303, was then backed to Centralia where it was turned around and then proceeded to Portland, reaching there at 12:30 May 13th. This same crew after being off duty about six

hours and a half returned to Tacoma on its regular run on train 308, and in doing so was on duty about 17 hours without having had 8 hours off duty. At the time train 303 left Tacoma, Chief Dispatcher J. L. Alsip was on duty and by reason of the wreck of train 362, which demoralized the system and brought to the train dispatcher innumerable difficulties, remained at work until 10:30 or 11 o'clock that night instead of leaving, as ordinarily, between 6 and 6:30. (Record 25). By reason of this condition of traffic the night Chief Dispatcher was also busy in routing the trains, which had been thrown off their schedule, and making disposition of the traffic, which entailed a great amount of work, care and anxiety by reason of the wreck. This condition gave to the dispatchers no time or opportunity to check up the time of the various train crews, or give their attention to ordinary matters of detail.

Thomas Doyle was the conductor on trains 303 and 308 and had been a passenger conductor for the defendant for over twenty years and had been on this particular run between fifteen and twenty years. (Record p. 28). The defendant had issued bulletins, explaining the Hours of Service Law, and warning train crews against working over sixteen hours, and Mr. Doyle was fully advised in regard thereto. (Record p. 29).

It did not occur to Mr. Doyle that his crew would be out more than sixteen hours and it was

not called to his attention until the next day after his return on No. 308 (which would be May 14) when it was first called to his attention by the train dispatcher, who had discovered the overtime when checking up the number of hours put in by this crew. (Record pp. 29-30). That the train dispatcher had had no opportunity to check the matter up before this time on account of the demoralized condition of the service as a result of the wreck, is clearly shown by the evidence.

Counsel for the Government criticises the defendant for not relieving the crew at Portland, insisting that as Portland was one of the terminals for these trains, it should have been known that the crew could not return on 308 and reach Tacoma without being in service more than sixteen hours. While this is true under ordinary conditions, it is shown by the evidence that an extraordinary situation prevailed on account of the wreck of train 362. This extraordinary condition prevented the dispatchers from knowing at the time that the crew would be in service in excess of the statutory period. Again it is not shown by the evidence that there was any other train crew at Portland which could have brought out train 308. It is shown that trains 303 and 308 constitute a round trip service and that the only time there is ever a change in these crews was "occasionally for personal reasons Mr. Doyle and the other crew would change. It was permissible on application to the Superintendent, but generally speaking this

was his run for years and years." (Record 20). It is here shown that whenever this crew does change from its regular run it is on application to the Superintendent so that previous arrangements therefor may be made. Therefore when this crew was delayed on train 303 by reason of an unavoidable casualty, it affected the crew until it returned to its terminal at Tacoma, and the fact that the train on which they returned was designated by a different number was no more important than if the number of train 303 should be changed on its trip to Portland at some station between Tacoma and Portland. It was at all times the same crew performing the same service.

Counsel also in their brief call attention to the fact that no effort was made to relieve this crew while enroute. On the trial of the case counsel for the Government asked Conductor Doyle:

"Q. And they could have relieved you possibly at some point up the line?

"A. I do not know hardly how they could get a crew out there.

"Q. Did they have a right to do that?

"A. I could not answer that. I do not think —there was no train out there in time to get a crew out to relieve us." (Record p. 30).

In addition to this explanation by the witness, which was the only evidence offered on this question, it had been fully shown by the evidence that on account of the unusual condition which was not

to be anticipated there had been no opportunity to check up the service of this crew until the injured had been cared for, the wreck cleared away, the various trains, which had been tied up, again set in motion, and the great stress under which the dispatcher's office was necessarily placed to a certain extent relieved, which was after the arrival in Tacoma of train 308.

It was conditions of this kind which sometimes, but exceptionally arise, that prompted Congress to adopt the proviso in Section 3 of the act to make provision for similar cases arising out of unforseen conditions. It is well known that men laboring to relieve a situation where lives have been lost and persons injured, as the result of a disastrous wreck, cannot use the foresight, coolness and deliberation which they do under ordinary conditions, and Congress intended to make provision for such.

Each cause of action in the complaint contained the following allegation:

"Plaintiff further alleges that said employee, while required and permitted to remain and continue on duty as aforesaid, was engaged in and connected with the movement of said defendant's train 308, drawn by its own locomotive engine No. 252, said train being then and there engaged in the movement of interstate traffic."

The evidence showed that the actual service in connection with train 308 from Portland to Tacoma was only 5 hours 40 minutes, including preparatory time, so there was no violation of the

law solely in connection with train 308. In order to make a pretense of a violation of the law, it is necessary to consider the operation of train 308 in connection with train 303 as forming a continuous round trip, which, in fact, it was. Then if considered in connection with train 303 as forming a continuous round trip, the effect upon this trip by a wreck, as shown by the evidence, brings the case within the exception.

Counsel for the government find it necessary to sustain their contention to argue, or rather to assert, that there was no casual connection between the derailment of the O.-W. R & N. train and the overtime. But this is to beg the whole question. The testimony was directly to the contrary. It appears that the method of checking up overtime in use was through and by the dispatcher's office in charge and control of the train's movement. In ordinary operation this is a sure check and enables the carrier to comply with the law. But in this instance the obstruction of a single track over which twenty-eight passenger trains moved every twenty-four hours, eighteen of which would move during the day or early evening, to say nothing of many freight trains; the necessity for arranging and caring for the movement of wrecking outfits, so unavoidably overwhelmed the chief dispatcher's office that he was wholly unable to check up and care for possible minute violations of the hours of service law in case of a particular crew in charge of a particular

train. Under these circumstances, therefore, how can it be justly and truthfully claimed that there was no causal connection between the alleged minute violation of the hours of service law here claimed and the wreck of the O.-W. R. & N. train? How can it justly be claimed by the government that the chief dispatcher, a man holding one of the most difficult and responsible positions in the operating department of the carrier, was guilty of "a deliberate and wilful violation of both the letter and spirit of the law?" because, in the midst of the press and anxiety of his most exacting duties he did not anticipate that a minute violation of the hours of service law might possibly occur in connection with the movement of one of the twenty-eight trains over this line, in addition to the numerous freight and construction trains. We submit that counsel cannot really mean to charge the chief dispatcher (who must be the party at fault if any one be at fault), with a "deliberate and willful violation of the law" under these circumstances. Had the dispatcher been of this disposition, he could never have held this responsible position. Had he not been a man of resource, intelligence and high capacity he could not have handled the situation at all. Counsel has been misled by an excess of zeal in the discharge of his duty into casting unmerited aspersions upon a highly deserving employee. We submit that the proviso must have been intended to cover just such a situation as arose here. The business of transportation

must be carried on by the average man, and the law does not exact a greater measure of efficiency and care than is possessed by the average man. If there was short-coming in this instance it is because a man is not an automaton, and not because there was a "wilful and deliberate violation of the law" upon the part of an employee who was doing all that man could do to handle a highly difficult situation. Counsel have ignored this aspect of the situation. He has assumed gross neglect, incompetence or a willful and deliberate violation of the law because the dispatcher, in the midst of a fatal wreck and congestion of twenty-eight passenger trains on a 150-mile line did not exercise superhuman care to discover that possibly a minute violation of the hours of safety law would occur in the case of a particular train crew. It may appear to counsel in the quiet and seclusion of his office that this condition should have been anticipated. But let him put himself in the place of the chief dispatcher and judge his conduct in the light of the conditions existing at the time. Doing so who shall say that he was grossly negligent or guilty of a wilful and deliberate violation of the law?

We submit that the learned district judge could not do otherwise than direct a verdict for defendant, because the case made was clearly within the proviso of the act.

But if mistaken in this, then at least it was

for the jury to say whether the wreck of the O.-W. R. & N. train was the proximate cause of the overtime. It was for the jury to say whether, *in view of all the facts and circumstances existing at the time*, the chief dispatcher was guilty of negligence or of a wilful violation of the law for not anticipating the minute infraction that occurred. While the facts are not disputed it does not follow that a verdict should have been directed for the government, for there remains the inferences of negligence, vel non, to be drawn therefrom, and, to say the least, reasonable men might well reach a negative conclusion. In no event and under no circumstances was the government entitled to a directed verdict, and no other error is assigned. It is not assigned as error that the court erred in refusing to submit the question to the jury. It follows, therefore, that the case cannot be reversed on that ground.

We submit that the verdict and judgment below are right, and should be sustained.

Respectfully submitted,

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